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LOCO LABELS AND MARKETING MADNESS: IMPROVING HOW CONSUMERS INTERPRET INFORMATION IN THE AMERICAN FOOD ECONOMY

*Margaret Sova McCabe**

Don't you hate that dragging feeling at the end of a long workday—tired, hungry, drained, and wishing for a four-star dinner that won't make you feel guilty? One night, knowing I would not be eating that dinner, I settled on a quick trip to the grocery for at least a nutritious and eco-friendly meal. I scanned the aisles looking for a decent dinner that could be made quickly at home. In less than ten minutes I was in line and feeling great because my basket was laden with purchases prudent for both me, physically, and for the environment. In my basket were Kashi pesto pasta (the box said "all natural" and had healthy whole grain goodness), organic salad greens (although in a cellophane bag, the no pesticides claim made me feel good), light dressing (low fat, of course), organic fat free milk (enough said), and some Late July dark chocolate cookies (at least they were organic!). While I thought I could have had a bit less processed food, at least the choices were responsible—claims of whole grains, all natural, and pesticide free abounded.

As I waited in the checkout line, I smugly surveyed the basket of the man in front of me—Mr. Conventional, I decided to call him. He had steak and potato canned soup (people really eat that?),

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some bagged iceberg salad (isn't that just water?), Greek salad dressing (did he know how much fat that had?), store brand whole milk (ditto), and Oreos (ok, I love Oreos). "What a nutritional nightmare," I thought to myself, feeling even better about my healthy choices.

When I got home, my husband commented that he hoped I had picked up something good for my late dinner. Well, I launched into my healthy choice speech—organics, whole grains, pesticide free, antibiotic free! I even recounted my observations about Mr. Conventional. My husband, who is the pragmatist in the marriage, eyed me (and my receipt for \$19.95) skeptically. "How do you know you made out so much better?" he asked (I think he was feeling defensive). I quickly pointed out the labels—whole grains, antibiotic free, low fat! He just laughed and said something about me being "a marketing department's dream."

As a wife and a lawyer, I prefer not to be wrong. While microwaving the pasta, I set about proving to my husband that I had not succumbed to mere marketing madness or crazy labeling schemes. And wouldn't you know, there wasn't much difference between Mr. Conventional and me.¹ My purchases cost \$19.95. And, if I ate only the serving sizes, I would consume 605 calories, 1545 mg sodium, 19.5 g fat, and 32 g sugar. Mr. Conventional? He paid \$13.17. Assuming he ate only the serving sizes, he would consume 625 calories, 1465 mg sodium, 32.5 g fat, 34 g sugar. There was not much difference, except his wallet was in slightly better shape.

These numbers did not stack up in my favor. Sure, I had fewer fat calories and overall calories, but not by much! I spent more, but for what? Deflated about my feel-good grocery store trip, I started thinking like a lawyer about my purchases. What shaped my perceptions? What food information did I really know? What laws regulated this information? And, how about Mr. Conventional? How did he make his choices? Could we both have made better choices if we had more information?

¹ See Appendix A *infra* for a breakdown of the cost and nutritional information for the purchases.

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I. INTRODUCTION: WHY CARE ABOUT FOOD LABELS?

Most Westerners eat primarily processed foods.² Since the manufacturers of these foods prepare much of what America eats, consumers rely on labels to determine what they are consuming. The purpose of these labels is three-fold: (1) providing health, safety, and economic information; (2) protecting consumers from deceptive or fraudulent marketing; and (3) promoting fair economic competition and marketing.³ America's growing obesity epidemic, however, signals lawmakers, manufacturers, and consumers that the country is making poor dietary choices despite access to nutritional information through labels.

To improve the efficiency of the food economy⁴—and consequently public and environmental health—lawmakers, with the support of manufacturers and consumers, should make two principal changes to current labeling policies. The Federal government should: (1) adopt front-of-package, simplified nutrient labeling clearly cuing consumers about products' healthfulness or lack thereof, and (2) make greater use of marketing logos to disclose product production methods, particularly when the food has special attributes such as organic production or the absence of genetically engineered ingredients. Taking these steps would provide consumers with more information, and with more information consumers would likely make more informed purchases. As a result, manufacturers would be able to make

² See MARION NESTLE, WHAT TO EAT 12 (2006); MICHAEL POLLAN, IN DEFENSE OF FOOD 106–14 (2008); see generally RAJ PATEL, STUFFED & STARVED 1–6 (2007); ERIC SCHLOSSER, FAST FOOD NATION 3–10 (2002).

³ ELISE GOLAN ET AL., U.S. DEP'T OF AGRIC., ECONOMICS OF FOOD LABELING, (2001), available at <http://www.ers.usda.gov/publications/aer793/AER793.pdf>; Edna Einsiedel, *Consumers and GM Food Labels: Providing Information or Sowing Confusion?*, 3 AG. BIO FORUM 231, 231 (2000), available at <http://www.agbioforum.org/v3n4/v3n4a09-einsiedel.pdf>.

⁴ For the purposes of this article, I use the term “food economy” to refer to the transactional relationships between food producer, food consumer, and government as regulator. See generally Marc T. Law, *The Origins of State Pure Food Regulation*, 4 J. ECON. HIST. 1103 (2003) (hypothesizing that 19th Century food laws were motivated by the desire to address asymmetric information between producers and consumers).

products that consumers demand, rather than developing products and generating demand through marketing. The continuation of poor consumer choices results in an inefficient food economy that promotes consumption, regardless of health consequences.

The Food and Drug Administration (FDA) controls the most meaningful food label and marketing information⁵ for average consumers. As is often the case in areas of government regulation, the agency serves as the initial information broker—it mandates what labels must disclose to consumers and how that disclosure takes place, as well as prohibits certain disclosures or claims.⁶ In this way, the government interferes with what would otherwise be a free market. Of course, there are compelling reasons for this, such as public health, safety, and moral concerns.⁷

The danger, however, is the resulting imbalance known to economists as “asymmetric information.”⁸ This information

⁵ E.g., Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 341 (2006) (“Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container.”); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

⁶ See Christine Moorman, *A Quasi Experiment to Assess the Consumer and Informational Determinants of Nutrition Information Processing Attributes*, 15 J. PUB. P. & MKTG. 28, 29 (1996) (analyzing the effect of mandated food label information on consumer choices); Christine Moorman & Linda L. Pierce, *Consumer Policy and Consumer Segment Interactions*, 8 J. PUB. P. & MKTG. 181, 182–83 (1989) (providing specific examples of Federal Trade Commission approaches to regulating consumer information); see generally GEORGE J. BENSTON, *REGULATING FINANCIAL MARKETS* (1999) (analyzing and critiquing how the government regulates the flow of information between consumers and the financial services industry and making proposals for more consumer friendly, less costly reforms).

⁷ See GOLAN, *supra* note 3, at 1 (“In recent years, government intervention in labeling has begun to target a new purpose, namely, influencing individual consumption choices to align them with social objectives.”); S. Andrew Starbird, *Moral Hazard, Inspection Policy, and Food Safety*, 87 AM. J. AGRIC. ECON. 15, 16 (2005) (noting that imperfect information leads to less food safety).

⁸ “Asymmetric information” is a theory that explains marketplace behavior.

imbalance in turn creates the phenomenon of adverse selection, whereby consumers select low quality goods due to incomplete or dishonest information.⁹ This article argues that the current law and policies of our food economy have enabled the development of “an adverse selection of low-quality products,” at least from public health and consumer choice perspectives, in significant portions of the food economy.¹⁰

In 2001, three economists won the Nobel Prize for their work in this area: George Akerlof, Michael Spence and Joseph Stiglitz. Their prize-winning work:

extended the theory when they augmented [it] with the realistic assumption of asymmetric information: agents on one side of the market have much better information than those on the other side. Borrowers know more than the lender about their repayment prospects; the seller knows more than buyers about the quality of his car; the CEO and the board know more than the shareholders about the profitability of the firm; policyholders know more than the insurance company about their accident risk; and tenants know more than the landowner about their work effort and harvesting conditions. More specifically, Akerlof showed that informational asymmetries can give rise to *adverse selection* on markets. Due to imperfect information on the part of lenders or prospective car buyers, borrowers with weak repayment prospects or sellers of low-quality cars crowd out everyone else from the market. Spence demonstrated that under certain conditions, well-informed agents can improve their market outcome by *signaling* their private information to poorly informed agents. The management of a firm can thus incur the additional tax cost of dividends to signal high profitability. Stiglitz showed that an uninformed agent can sometimes capture the information of a better-informed agent through *screening*, for example by providing choices from a menu of contracts for a particular transaction. Insurance companies are thus able to divide their clients into risk classes by offering different policies, where lower premiums can be exchanged for a higher deductible.

Nobelprize.org, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2001, http://nobelprize.org/nobel_prizes/economics/Laureates/2001/public.html (providing additional summaries of Akerlof, Spence, and Stiglitz's work with citation to their major publications) (last visited Apr. 5, 2009).

⁹ George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 463–95 (1970); Nobelprize.org, *supra* note 8 (“[T]he information problem can either cause an entire market to collapse or contract it into an adverse selection of low-quality products.”).

¹⁰ See NESTLE, *supra* note 2, at 19–20 (discussing ways in which current

A. The Label Playing Field

Consumers navigate a complicated and highly regulated world of food labeling and marketing. Law shapes not only the information on packaging, but also how manufacturers formulate the food within the package. Three key agencies play central roles in administering these laws in the United States: the FDA,¹¹ the United States Department of Agriculture (“USDA”),¹² and the Federal Trade Commission (“FTC”).¹³ Once government interferes with a consumer market, no matter how legitimate that interference may be, it has an ongoing obligation to stay attuned to science, public health trends, and consumer preferences as they change over time. When government fails to do this, markets become increasingly inefficient and ultimately economically and socially unhealthy.

Since the inception of food labeling regulation, the FDA has set some of the most informative regulations in the world for label disclosure of sodium, sugars, and fats.¹⁴ In the United States, manufacturers must provide this and other food content information primarily on the “nutrition information” panel of the package.¹⁵ The FDA also permits the inclusion of nutritional claims intended to convince the consumer a particular product is healthful.¹⁶ Examples of these claims include “low fat,” “low sodium,” “reduced cholesterol,” and “lite.”¹⁷

food economy encourages purchasing of processed foods).

¹¹ This article focuses on the FDA’s authority under the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2006).

¹² This article focuses on the USDA’s authority under the Organic Food Production Act of 1990, 7 U.S.C. §§ 6501–6522 (2006).

¹³ This article focuses on the relationship between FDA and USDA standards and complaints brought before the Federal Trade Commission. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

¹⁴ FDA Food Labeling Rules, 21 C.F.R. §§ 101.1–101.108 (2009).

¹⁵ FDA Nutrition Labeling of Food, 21 C.F.R. § 101.9 (2009).

¹⁶ FDA Specific Requirements for Health Claims Rules, 21 C.F.R. §§ 101.70–101.83 (2009).

¹⁷ FDA Specific Requirements for Nutrient Content Claims, 21 C.F.R. §§ 101.54–101.69 (2009).

Despite having some of the best nutritional information in the world on labels, however, America's obesity, diabetes, metabolic syndrome, and heart disease rates have skyrocketed.¹⁸ This phenomenon indicates that the American food economy's regulatory underpinnings may be promoting an information imbalance with negative consequences for public health.¹⁹

The FDA and USDA are easy targets to blame for America's diet going awry—they have a history of yielding to industry lobbying and regulating in ways perceived to promote the processed food industry.²⁰ Although it is the consumer who chooses what to buy,²¹ it seems unfair to blame consumers for poor

¹⁸ Studies clearly establish the prevalence of obesity and its related disorders in American society. See NAT'L CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), NAT'L HEALTH & NUTRITION EXAMINATION STUDY (NHANES), PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 2003–2004, http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm (last visited Apr. 5, 2009); CTR. FOR DISEASE CONTROL & PREVENTION (CDC), U.S. OBESITY TRENDS 1985–2007, <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/> (last visited Apr. 5, 2009); CTR. FOR DISEASE CONTROL & PREVENTION (CDC), OVERWEIGHT AND OBESITY, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Apr. 5, 2009) (listing the many diseases and health conditions for which obese individuals are at an increased risk).

¹⁹ There are many other examples that are beyond the scope of this article. One of the most obvious indications that there are serious market problems is the current world food crisis. One can only imagine whether the crisis could have been avoided if people better understood the national and global food economy. See generally PATEL, *supra* note 2.

²⁰ MICHELE SIMON, APPETITE FOR PROFIT 143, 154–56 (2006) (“[W]hen it comes to solving the nation’s epidemic of diet-related diseases, Uncle Sam is more aligned with Big Food than with the citizens it’s supposed to represent.”); see also PATEL, *supra* note 2, at 108–17 (“[I]f we look at the sums donated in the US political system . . . we see that the top four companies in many sectors of the food system are responsible for more than half the political contributions.”).

²¹ See SIMON, *supra* note 20, at 22. When discussing the problem food manufacturers have in acknowledging the rates of diabetes, heart disease, and other diet related health problems Simon notes:

So, many food corporations, trade associations, and industry front groups are adopting an intermediary approach: admitting there’s a problem but laying the blame elsewhere—with the individual. Call it

choices when they are arguably acting on imperfect information about our food. The current regulatory scheme creates labels that emphasize the positives where possible, yet are nearly silent about the negatives. This scheme, of course, makes sense given our capitalist emphasis on consumption and the marketing required to ensure goods are consumed.²²

However, food is not simply a commodity, a good to be manufactured and sold. Science has undeniably linked the quality of human diet to human health.²³ Additionally, while skeptics remain, science has linked our agricultural practices to the quality of our environment.²⁴ Given the human health and environmental impacts consumer food choices have, food labels—especially processed food labels—should strive for more “perfect” information.²⁵ Without better information, consumers are misled

the “personal responsibility” strategy. The line of reasoning goes like this: it’s up to each individual to make “better” choices at supermarkets and restaurants . . . [c]onsumers who are having difficulty figuring out the “right” options for healthier living are simply in need of “better education”—which food manufacturers and PR mavens are happy to supply, but of course only in the most corporate friendly ways.

Id.

²² That is not to say that capitalism cannot successfully address environmental or health issues. *See generally* GARY HIRSHBERG, *STIRRING IT UP* (2008).

²³ *See* sources cited *supra* note 2 (discussing the relationship between human health and diet).

²⁴ *See* Donald T. Hornstein, *The Road Also Taken: Lessons from Organic Agriculture for Market- and Risk-Based Regulation*, 56 DUKE L.J. 1541, 1546–47 (2007) (When analyzing the “emergence of a cause-based approach to environmental reform that seeks fundamental changes in production systems or human behavior to prevent environmental harms from arising in the first place,” Hornstein draws on Rachel Carson’s *Silent Spring*, which urged farmers and others to forgo the arrogance of controlling nature in favor of agriculture that is “based on understanding of the living organisms [farmers] seek to control, and of the whole fabric of life to which these organisms belong.” RACHEL CARSON, *SILENT SPRING* 278 (First Mariner Books ed. 2002)).

²⁵ *See, e.g.,* Williams v. Gerber Prods. Co., No. CV-05-01278, 2008 WL 5273731, at *4 (9th Cir. Dec. 22, 2008) (“[W]e do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the

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and our food economy becomes inefficient.²⁶

B. Informing Labels: Science and Marketing

This article addresses two examples of the ongoing struggle to find the proper balance between government regulation, reliable science, and consumers' demand for information. The examples—the prolonged debate over salt's designation as a "safe" food additive and the tension over the National Organic Program—illustrate that the balance of information and regulation is not yet optimal. Furthermore, science and public health play key roles in policy review and form the foundation of label policy. Government must also consider that other emerging consumer concerns beyond food safety, such as environmental impact, animal welfare, and social justice for workers and the poor, are playing increasingly important roles in food labeling policy making.²⁷

A label's front panel is prime real estate—the place to grab the consumer. Government and the market can achieve a better information balance by providing more "perfect" label information on this panel. To better optimize food label regulations, the FDA could follow the United Kingdom's lead and implement "negative labels" that flag foods high in salt, sugar, and/or fat with amber or red light symbols.²⁸ Similarly, the FDA and USDA could improve the information balance by increasing transparency about the processes underlying label designations such as "USDA Organic."²⁹

ingredient list contains more detailed information about the product that confirms other representations on the packaging.").

²⁶ See *supra* notes 7–8.

²⁷ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 534 (2004) (noting that "process preferences can be expected to capture the displaced moral and political sentiments of individuals who have been encouraged to regard the market as a more sure route to self-expression and efficacious activity than traditional public channels"). See generally PATEL, *supra* note 2.

²⁸ See *infra* notes 75–76 and accompanying text.

²⁹ See *infra* notes 113–22 and accompanying text.

Consumers make their food choices in the grocery store, which also plays a role in shaping purchasing decisions. Accordingly, stakeholders such as food manufacturers, wholesalers, and retailers should also consider marketplace innovations that operate without regulation to promote more informed food purchases. Such innovation requires the grocery industry taking matters into its own hands, as one supermarket chain has already done by providing supplemental food information on the grocery shelves to apprise the consumer of “negative” information.³⁰ This approach could be expanded to include the redesign of grocery stores around health, rather than food category. For example, grocery stores could design “green light” aisles populated with minimally processed foods, or those low in sugar, salt and fat. To innovate, however, stakeholders also need to understand where our labeling policies can be improved. This article offers two instructive examples and then makes recommendations about learning from those experiences.

Part I of this article examines recent FDA public hearing proceedings, upon petitions for review, to revisit the Agency’s designation of salt as “generally regarded as safe” under the Food, Drug, and Cosmetics Act. This example illustrates how complicated regulating one food additive can be and how the FDA’s slow response to such issues require America to take a fresh look at communicating information about processed food ingredients to consumers.

Part II examines how the National Organic Program (NOP) uses niche marketing to help consumers find foods produced without antibiotics or pesticides. While NOP is an innovative program that promotes an agriculture system that many view as sustainable and healthful, critics also claim that it erodes “true” organics. There is support for such criticism, as the program engenders consumer confusion in the marketplace.³¹ For example,

³⁰ Hannaford Corporation uses the Guiding Stars Rating System to provide additional information to consumers about how to rate the healthfulness of products. Hannaford, *What is Guiding Stars?*, http://www.hannaford.com/Contents/Healthy_Living/Guiding_Stars/index.shtml (last visited Jan. 31, 2009); see also *infra* notes 85–89 and accompanying text.

³¹ See Amanda Thomas, *Synthetic Materials and Organic Foods*, 24 Agric.

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many average consumers do not know that organic cookies contain many of the same ingredients as conventional cookies. Accordingly, NOP illustrates an innovative way of providing better information to consumers, although the USDA must work harder to educate consumers about the true meaning of its organic marketing seal.

Part III makes suggestions for innovative, effective labeling schemes that will promote more efficient food markets. If consumers want to eat “healthy” and “natural” foods, our regulatory system should allow for that. Similarly, the system should allow for consumers to make food purchasing decisions based on taste preferences alone, but with fuller disclosure of the negative personal, public, and environmental health consequences of those decisions.

I. SALT

[I]n all ages salt has been invested with a significance far exceeding that inherent in its natural properties, interesting and important as these are. Homer calls it a divine substance, Plato describes it as especially dear to the Gods, and we shall presently note the importance attached to it in religious ceremonies, covenants and magical charms. That this should have been so in all parts of the world and in all times shows that we are dealing with a general human tendency and not with any local custom, circumstance or notion.³²

Given this grand description of salt (sodium chloride), what should we make of the fact that Mr. Conventional’s soup contains 41% of the recommended daily allowance of sodium—a whopping 82% if he consumes the entire can? Should consumers be concerned that the FDA recently held a public hearing³³ to revisit

L. Update 1, 3 (2007) (citing 7 C.F.R. § 205.606).

³² MARK KURLANSKY, *SALT, A WORLD HISTORY* 2–3 (2002) (quoting Ernest Jones’ 1912 essay on “the human obsession with salt”).

³³ Salt and Sodium, 72 Fed. Reg. 59,973 (proposed Oct. 23, 2007) (to be codified at 21 C.F.R. pt. 86) (announcing a public hearing and petition to revise the regulatory status of salt and establish food labeling requirements for it).

its sodium policy? The hearing, called in response to a petition to review salt's designation as "generally regarded as safe" (GRAS) under the Food, Drug, and Cosmetics Act,³⁴ is an important chapter in the American story of food labeling.

Salt serves as a prominent example of how the current regulatory system conditions consumers to look for signals that a product is "healthy" and the consumer should buy it. However, what we really need is a more balanced system that allows consumers to make a decision *not* to purchase, as easily as to purchase. While this may seem antithetical to the modern American food economy (and it probably is), only with full disclosure of a product's attributes can we hope to have a food economy that functions efficiently by prompting informed purchases.³⁵

³⁴ 21 U.S.C. §§ 321, 348 (2006). When a substance is classified as GRAS under the FDCA, it can be added to foods without pre-market review. In contrast to GRAS, the law defines "food additive" as:

any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use

21 U.S.C. § 321(s).

³⁵ Certainly, the purpose of the FDCA, *supra* note 5, provides a touchstone for the FDA to revisit issues such as salt if public health data can support the Secretary's determination that consumers are not getting "fair" information about a product's attributes. Individual manufacturers may not be at fault in terms of providing "unfair" information—it may be that consumption patterns (as discussed by journalists such as Pollan and experts such as Nestle, *supra* note 2) change in a way that makes a GRAS designation unwise.

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A. Is Salt Safe?

Many scientists agree that excessive salt consumption has dire health consequences for most humans,³⁶ yet the law classifies it as “safe.”³⁷ Further at odds with the GRAS classification is the FDA’s permission to manufacturers to market foods with health claims such as “low sodium” or “sodium free.”³⁸ Thus, while consumers who seek low sodium products may find them, we are generally led to assume that there are no negative health effects of salt consumption.

Public health experts increasingly blame salt for the increased risk of heart disease and stroke worldwide.³⁹ In the United States,

³⁶ Compare WORLD HEALTH ORGANIZATION, REDUCING SALT INTAKE IN POPULATIONS (2006), available at http://www.who.int/dietphysicalactivity/reducing_salt_intake_EN.pdf [hereinafter WHO SODIUM REPORT] (concluding that scientific literature supports the need for government policies for immediate reduction in the world food supply to reduce heart disease and stroke) and Nancy R. Cook et al., *Long-term Effects of Dietary Sodium Reduction on Cardiovascular Disease Outcomes: Observational Follow-up with the Trials of Hypertension Prevention*, 334 BRIT. MED. J. 885 (2007), available at <http://www.bmj.com/cgi/rapidpdf/bmj.39147.604896.55v1> (concluding that sodium reduction may also reduce long term risk of cardiovascular disease), with Hillel W. Cohen et al., *Sodium Intake and Mortality in the NHANES II Follow-up Study*, 119 AM. J. MED. 275 (2006) (scientific study noting that evidence “linking sodium intake to mortality outcomes is scant and inconsistent”).

³⁷ An analysis of GRAS classification is beyond the scope of this article. For the reader unfamiliar with GRAS standards, it is essential to understand that it means either: (1) “the scientific data and information about the use of a substance must be widely known and there must be a consensus among qualified experts that those data and information establish that the substance is safe under the conditions of its intended use,” or (2) “[f]or a substance used in food before 1958, a GRAS determination can be made through experience based on common use in food. [That is,] . . . a substantial history of consumption in food by a significant number of consumers.” Paulette Gaynor & Sebastian Cianci, *FDA, Regulatory Report: FDA’s GRAS Notification Program Works*, FOOD SAFETY MAG., Dec.–Jan. 2005–2006, available at <http://www.cfsan.fda.gov/~dms/grasov2.html>; see also 21 C.F.R. §§ 170.30(c), (f).

³⁸ FDA Specific Requirements for Nutrient Content Claims, *supra* note 17.

³⁹ See WHO SODIUM REPORT, *supra* note 36, at 21–22 (noting various European groups and companies trying to reduce levels of salt in food content).

the American Medical Association sounded the regulatory alarm in 2006 when it suggested that the FDA remove salt's GRAS classification.⁴⁰ However, this recent spate of attention is only the latest chapter in the effort to regulate salt in processed foods. Health and consumer activists' demands for closer sodium regulation, while ongoing for thirty years, have largely failed. This failure suggests either that the government has not kept up with the science showing that excess dietary sodium is detrimental to human health, despite a legal process to review the safety of GRAS substances, or worse, that the government has allowed food industry lobbying to supersede science.⁴¹

B. Regulatory History 1958–2006

Salt's modern regulatory history commenced in 1958, when the Food Additives Amendment of 1958 grandfathered salt as a substance "generally regarded as safe."⁴² This classification means that manufacturers are free to add salt to their products as desired, rather than it being regulated as a "food additive" requiring pre-market clearance procedures.⁴³ In 1969, the FDA began its systematic review of all food ingredients previously listed as GRAS without a detailed scientific review, including salt.⁴⁴ The FDA contracted with the Federation of American Societies of Experimental Biology (FASEB) to evaluate salt's safety.⁴⁵ A

⁴⁰ Salt and Sodium, 72 Fed. Reg. 59,973, 59,976 (proposed Oct. 23, 2007) (to be codified at 21 C.F.R. pt. 86) (noting that at its July 2006 annual meeting the American Medical Association issued a report seeking to remove salt's GRAS designation).

⁴¹ Another potential rationale for the FDA's failure to revise sodium standards is simply that it has not been able to allocate resources to the problem, given other regulatory demands on the agency.

⁴² 21 U.S.C. § 321; *see also* FDA, *History of the GRAS List and SCOGS Reviews* (Oct. 2006), available at <http://www.cfsan.fda.gov/~dms/opascogh.html>

⁴³ *See* 21 U.S.C. § 321(s). Indeed, some FDA regulations *require* salt as an ingredient in certain branded food, such as cheese. *See, e.g.*, 21 C.F.R. § 133.06 (2007).

⁴⁴ 21 C.F.R. §§ 170.30(e)–(f) (1983).

⁴⁵ GRAS Safety Review of Sodium Chloride, 47 Fed. Reg. 26,590, 26,591

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decade later, the FASEB reported to the FDA:

[I]t is the prevalent judgment of the scientific community that the consumption of sodium chloride in the aggregate should be lowered in the United States. The Select Committee agrees and favors development of the guidelines for restricting the amount of salt in processed foods, a major contributor of dietary sodium. Adequate labeling of the sodium content of foods would help meet these objectives.⁴⁶

In 1978, the Center for Science in the Public Interest (CSPI) petitioned the FDA in an effort to turn the FASEB's findings into mandatory regulation, rather than relying on manufacturers' voluntary salt reductions.⁴⁷ The FDA denied the petition as substantively moot, noting that between 1978 and 1982, the agency issued its core sodium policy and amendments addressing the FASEB report.⁴⁸ Dissatisfied that the FDA adopted voluntary guidelines and that the core sodium policy failed to include meaningful regulation, the CSPI next sued the FDA.⁴⁹ The district court upheld the FDA's discretion to deny the CSPI's original petition.⁵⁰ Specifically, the court ruled that FDA voluntary labeling measures contained in its 1982 policy were adequate under the law, and that the "the FDA should be given the opportunity to test these methods to determine if food manufacturers will provide sodium content labeling and lower the amount of sodium in

(June 18, 1982).

⁴⁶ *Id.* at 26,592. Oddly, the report goes on to note that the scientific evidence at the time was inconclusive as to salt's effect on a "significant proportion of the public when it is used at levels that are now current and in the manner now practiced." *Id.* at 26,592.

⁴⁷ *See* Salt and Sodium, 72 Fed. Reg. 59,973, 59,975 (proposed Oct. 23, 2007) (to be codified at 21 C.F.R. pt. 86); Center for Science in the Public Interest v. Novitch, Food Drug Cosm. L. Rep. (CCH) ¶ 38,275 (D.D.C. June 11, 1984), *available at* http://cspinet.org/new/pdf/salt_lawsuit.pdf.

⁴⁸ Salt and Sodium, 72 Fed. Reg. at 59,975.

⁴⁹ Center for Science in the Public Interest v. Novitch, Food Drug Cosm. L. Rep. (CCH) ¶ 38,275 (D.D.C. June 11, 1984), *available at* http://cspinet.org/new/pdf/salt_lawsuit.pdf.

⁵⁰ *Id.*

processed foods voluntarily.”⁵¹ This decision paved the way for another two and half decades of half-measures and regulatory leniency that continue the myth that salt, at any level, is “safe.”

Today, the salt fight is alive once again. In October 2007, the FDA announced a public hearing to “share” its current sodium policy, likely prompted by a CSPI citizen petition.⁵² Based on past proceedings, it again appears that there is little chance that the FDA will classify salt as a “food additive.” The question, however, is whether the FDA has done enough between 1978’s FASEB report and 2008 to provide accurate, helpful sodium content information to American consumers.

This article argues that the answer is no, although progress has been made. In 1984, the FDA adopted various “health claim” regulations for sodium.⁵³ These rules allow manufacturers to place the words “sodium free,”⁵⁴ “very low sodium,”⁵⁵ “low sodium,”⁵⁶ “reduced sodium,”⁵⁷ “no added salt,”⁵⁸ or “light”⁵⁹ on food

⁵¹ *Id.*

⁵² Salt and Sodium, 72 Fed. Reg. 59,973 (proposed Oct. 23, 2007) (to be codified at 21 C.F.R. pt. 86).

⁵³ FDA Nutrient Content Claims for the Sodium Content of Foods, 21 C.F.R. § 101.61 (2008). *But see* Food Labeling, 49 Fed. Reg. 15510 (Apr. 18, 1984) (to be codified at 21 C.F.R. pt. 101) (noting only five claims).

⁵⁴ 21 C.F.R. § 101.61(b)(1) (defining “sodium free” as, *inter alia*, containing less than 5 milligrams (mg) of sodium per serving).

⁵⁵ *Id.* at § 101.61(b)(2) (defining “very low sodium” as generally less than 30–35 mg per serving, depending on the type of food labeled—per serving, reconstituted, etc.).

⁵⁶ *Id.* at § 101.61(b)(4) (defining “low sodium” as, *inter alia*, 140 mg or less of sodium per serving).

⁵⁷ *Id.* at § 101.61(b)(6) (defining “reduced sodium” foods as containing at least 25% less sodium than the reference food).

⁵⁸ *Id.* at § 101.61(c) (prohibiting the use of “unsalted” or “no salt added” unless no salt is added during processing, where the food would usually have salt added, and requiring that the product carry the words “not a sodium free food” if the product does not meet the definition of “sodium free”).

⁵⁹ The terms “light” and “lite” are also restricted to products that contain no more than 50% of the sodium contained in the “reference food.” Nutrient Content Claims for “Light” or “Lite,” 21 C.F.R. § 101.56(c)(1) (2009). The “reference food” is the regular version of a food. For example a “light” tomato soup must have no more than 50% of the sodium in the original. *Id.*

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packaging. In 1993, the FDA adopted further labeling requirements for sodium. The most important of these requirements established a reference value, commonly known to Americans who read labels as the “Daily Value,” which sets forth the recommended upper threshold for daily sodium consumption.⁶⁰ This value is 2,400 milligrams of sodium per day⁶¹ for the average person.

Among countries with reference values, the American daily value recommendation is one of the lowest.⁶² Nonetheless, CSPI sought a further reduction of the daily value threshold to 1,500 milligrams⁶³ in its citizens’ petition filed in November 2005—a position that the American Medical Association (AMA) supports.⁶⁴

The AMA’s call for revocation of salt’s GRAS designation is striking because it signals that a major organization in the medical-scientific community believes that there is adequate evidence for the FDA to limit the use of salt in processed foods.⁶⁵ The AMA also recommends that food manufacturers voluntarily reduce the

⁶⁰ Nutrition Labeling of Food, 21 C.F.R. §§ 101.9(c)(4), (c)(9) (2009); Reference Daily Intakes and Daily Reference Values, 58 Fed. Reg. 2206, 2223–2224 (Jan. 6, 1993) (to be codified at 21 C.F.R. pt. 101) (discussing various proposed values for the daily intake of sodium). *See generally* Food Labeling Revision, 58 Fed. Reg. 2079, 2176 (Jan. 6, 1993) (to be codified at 21 C.F.R. pt. 101).

⁶¹ 21 C.F.R. § 101.9(c)(9) (2009).

⁶² WHO SODIUM REPORT, *supra* note 36, at 15.

⁶³ *Id.* at 19. However, the FDA’s November 2007 public hearing specifically excluded daily value from its scope because daily values are the subject of other rulemaking. Salt and Sodium, 72 Fed.Reg. 59,973, 59,976 (proposed Oct. 23, 2007) (to be codified at 21 C.F.R. pt. 86).

⁶⁴ *See* 72 Fed.Reg. at 59,974 (“FDA is aware that other organizations are in general agreement with some of the recommendations in CSPI’s petition. For example, at the July 2006 annual meeting of the American Medical Association (AMA), the AMA announced recommendations, in the form of a report issued by the AMA’s Council on Science and Health, to the agency echoing many of the regulatory actions suggested by CSPI”); Barry D. Dickinson & Stephen Havas, *Reducing the Population Burden of Cardiovascular Disease by Reducing Sodium Intake*, 167 ARCH. INTERN. MED. 1460, 1466 (2007) (noting AMA report’s conclusion that “the most substantial benefit in reducing [systolic blood pressure] was gained from reducing sodium intake from [2.3 g to 1.5 g] per day”).

⁶⁵ *See generally* Dickinson & Havas, *supra* note 64.

amount of sodium in processed foods by fifty percent.⁶⁶

Unsurprisingly, food manufacturers and industry groups oppose the AMA's position and its supporters. General Mills, for example, argued in its March 28, 2008 written testimony that salt's GRAS designation was appropriate because "[r]evocation (of GRAS) is not supported by science" and "the multi-functional properties of salt (including product safety) make it particularly difficult to determine appropriate ceilings across all product categories."⁶⁷ The National Restaurant Association similarly offered: "GRAS status is a scientific evaluation that must take place within a well-defined legal framework. There is no basis for revoking the present status of salt."⁶⁸ Morton Salt suggested that "FDA policies should emphasize dietary patterns rather than singular nutrients" and that "there is no magic bullet for sodium reduction."⁶⁹

C. Salt in the Twenty-First Century

What can we learn from the last fifty years of attempts to regulate salt in the American food supply? First, the American food supply has fallen victim to government's preference for industry and consumption.⁷⁰ These preferences leave the American

⁶⁶ *Id.*

⁶⁷ Letter from General Mills to FDA, Comments on Docket No. 2005P-0450 Salt and Sodium (Mar. 28, 2008), <http://www.regulations.gov> (search "FDA-2007-0545-0044.1").

⁶⁸ Letter from National Restaurant Association to FDA, Comment on Docket No. 2005P-0450 (Mar. 25, 2008), <http://www.regulations.gov> (search "FDA-2007-0545-0019.1").

⁶⁹ Comprehensive Outline of Morton Salt to FDA, Public Hearing Concerning FDA's Policies Regarding Salt (Nov. 20, 2007), <http://www.regulations.gov> (search "FDA-2007-0545-0030").

⁷⁰ See generally MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* 55 (2006) (quoting farmer George Naylor: "Agriculture's always going to be organized by the government; the question is, organized for whose benefit? Now it's for Cargill and Coca-Cola. It's certainly not for the farmer." And I would add, not for consumer health.); DEVRA DAVIS, *THE SECRET HISTORY OF THE WAR ON CANCER* 419–26 (2007). When recounting the political history of the artificial sweetener aspartame, Davis comments that:

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consumer largely unaware of health dangers. For example, when salt first received its GRAS status, manufacturers had just begun to package salted potato chips (the chips were previously sold plain with a salt packet in the bag).⁷¹ In 2008, while a consumer may be able to find “low sodium” health claims on packaging, what about the healthy teenager who buys a bag of Dill Pickle Flavor Lay’s Potato Chips? The packaging does not bear any “negative” information, and the teenager must be perceptive enough to know that a one-ounce serving (which accounts for one-sixth of the bag) contains 15% of the daily recommended sodium intake.⁷² If she consumes the whole bag, she will also consume 90% of her daily sodium intake. This dramatic example illustrates that while salt itself has not changed, the use of the substance in the food supply has. This alone should be a sufficient justification for the FDA to reconsider GRAS.⁷³

While revocation of GRAS for salt may not be necessary, the FDA must at least require more balanced, prominent health information on processed food labels. The FDA must consider the evolution of our food supply and the effects that this evolution has had on human health. Salt provides just one example of myriad ways in which our current regulatory scheme subtly promotes

[i]n January 1977, FDA Chief Counsel Richard Merrill made agency history. He formally asked the U.S. Attorney’s office to convene a grand jury to decide whether to indict the major producer of aspartame, G.D. Searle, for knowingly misrepresenting “findings, concealing material facts and making false statements” in aspartame safety tests. That this investigation never happened speaks volumes about the difficulty of acquiring independent information in commercially valuable products.

DAVIS, *supra*, at 419–20.

⁷¹ Nibble.com, The History of Potato Chips, <http://www.thenibble.com/reviews/main/snacks/chip-history.asp> (last visited Feb. 3, 2009) (noting that chips did not come pre-salted until the 1950’s).

⁷² Fritolay.com, Nutrition Label of Dill Pickle Flavored Potato Chips, <http://www.fritolay.com/our-snacks/lays-dill-pickle-chips.html> (last visited Feb. 3, 2009) (click on “See Nutrition Label: Flip the bag”).

⁷³ Substances Generally Recognized as Safe, 62 Fed. Reg. 18,939 (Apr. 17, 1997) (making the distinction between the substance and its use in foods) (to be codified at 21 C.F.R. pt. 170).

overconsumption and misinformation. Manufacturers' "health claims" help consumers find and buy "healthy" products without the suggestion that perhaps the consumer would be better off in the produce section. Why not include "health claims" that help consumers understand how to make better food choices, rather than just "positive" purchases of "healthy" foods?

The reason is that our food economy does not support this approach, nor does the FDCA or other food labeling laws and regulations. As a capitalist society, our system's success depends on consumption: buy more; eat more; buy it from a corporation; eat it in your car on the way to the mall. While this approach has been good for corporate America and the economy, it has been a disaster for the American diet. The FDA would significantly advance its mission of promoting and protecting the public health⁷⁴ if it required "balanced" label information—mandatory "high sodium" instead of voluntary "low sodium"; mandatory "heavy" instead of voluntary "light." This idea is not so far-fetched, although it may seem so to Americans familiar with the FDA's history.⁷⁵

In the United Kingdom, the Food Standards Agency (FSA) adopted a "traffic light signpost" system in 2007.⁷⁶ The system—currently voluntary—includes core information about calories, fat, sugar and salt on the front of packaging. Other nutritional information, such as calcium, must remain separate and comply with other regulations.⁷⁷ The categories encompassed by the system are assigned one of three levels of "healthfulness," each designated by a color: green, amber or red.⁷⁸ The intended result is that consumers easily identify green light foods as more healthful

⁷⁴ Presentation from U.S. Food and Drug Administration, FDA Overview, <http://www.fda.gov/oc/opacom/fda101/sld001.html> (last visited Jan. 30, 2009).

⁷⁵ See generally MARION NESTLE, *FOOD POLITICS* 51–66 (rev. & expanded ed. 2007); MICHELE SIMON, *APPETITE FOR PROFIT* 143–65 (Nation Books 2006).

⁷⁶ FOOD STANDARDS AGENCY, *FRONT-OF-PACK TRAFFIC LIGHT SIGNPOST LABELING - TECHNICAL GUIDANCE* (2007), available at <http://www.food.gov.uk/multimedia/pdfs/frontofpackguidance2.pdf>.

⁷⁷ *Id.* at 2–3.

⁷⁸ *Id.* at 5–6.

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than red light foods, with yellow light foods requiring moderation.⁷⁹

Consumer research formed the basis of the FSA program, not public hearings or pure politics.⁸⁰ The agency found that consumers wanted an easier way to determine the content of processed foods, which they reported “difficulty determining the nutritional content of.”⁸¹ It therefore specifically recommends seven product types for stop light labels: ready-made sandwiches; hot and cold prepared meals; burgers and sausages; pies, pastries and quiches; breaded formed meat, such as chicken nuggets; pizzas; and breakfast cereals.⁸² Manufacturers can use the labels more widely than these categories, and likely will do so if they are successful in marketing products to consumers in accordance with the recommendations.

The UK based the stop light label criteria on two sources: European Union Regulation No. 1924/2006,⁸³ recognizing that health and nutrition claims must be regulated “in order to ensure a high level of protection for consumers and to facilitate their choice”⁸⁴ of safe, healthy foods; and recommendations of the UK’s own Committee on Medical Aspects of Food and Nutrition Policy (COMA) and Scientific Advisory Committee on Nutrition (SACN).⁸⁵

⁷⁹ Food Standards Agency, Using Traffic Lights to Make Healthier Choices 3 (2007), *available at* <http://www.food.gov.uk/multimedia/pdfs/publication/foodtraffilight1107.pdf>.

⁸⁰ The FSA commenced an evaluation project, independently managed by the Project Management Panel, with the goal of “establish[ing] which scheme(s), or elements of the scheme(s), best enable consumers to make informed choices about the foods they purchase.” Food Standards Agency, The Independent Evaluation Project, <http://www.food.gov.uk/foodlabelling/signposting/signpostevaluation/pmpanel/evaluation/> (last visited Dec. 24, 2009). For a catalogue of the panel’s studies to date, see *id.*

⁸¹ *Id.* at 4.

⁸² *Id.*

⁸³ Council Regulation 1924/2006, Nutrition and Health Claims Made on Foods, 2007 O.J. (L12/3).

⁸⁴ *Id.* at 1.

⁸⁵ The Scientific Advisory Committee on Nutrition

is an advisory Committee of independent experts that provides advice

The nutritional criteria for each color are similar to American labeling guidelines. The sodium levels permitted in a green light food are .30 grams per 100 gram serving, resembling the American “sodium free” standard.⁸⁶ Manufacturers label products containing .3 to 1.5 grams of salt per serving with an amber marking (“low salt”), and products containing more than 1.5 grams per serving with red. For fats, products labeled with a green light can have no more than 3 grams of fat per 100 gram serving, just as the FDA permits a “low fat” label on foods that contain no more than 3 grams of fat.⁸⁷ A yellow light food, by contrast, can have a fat range of 3 to 20 grams, while a red light is used for foods that either have greater than 20 grams of fat per 100 grams or 21 grams of fat per portion.⁸⁸ Significantly, the FDA has no equivalent of the red light designation with respect to sodium or fats—products containing more than 1.5 grams of sodium or 20 grams of fat per serving carry no special label alerting consumers of that content.⁸⁹

to the Food Standards Agency and Department of Health as well as other Government Agencies and Departments. Its remit includes matters concerning nutrient content of individual foods, advice on diet and the nutritional status of people. Members are appointed as independent scientific experts on the basis of their specific skills and knowledge. There are also two members to represent consumers. Members are required to conduct themselves in accordance with the Code of Conduct for Scientific Advisory Committees. Individuals are required to declare conflicts of interest and during discussions they may be disqualified at the Chairman’s discretion from contributing to the conclusions and recommendations of the Committee.

The SCAN replaces the Committee on Medical Aspects of Food and Nutrition Policy (COMA), but COMA’s prior work is still referenced in the FSA’s stop light guidelines. See Scientific Advisory Committee on Nutrition, Chairman’s Introduction, http://www.sacn.gov.uk/about_us/index.html (last visited Feb. 4, 2009).

⁸⁶ Compare GRAS Safety Review of Sodium Chloride, 47 Fed. Reg. 26,590 26,591 (June 18, 1982), with FRONT-OF-PACK TRAFFIC LIGHT SIGNPOST LABELING, *supra* note 76, at 6.

⁸⁷ Nutrient Content Claims for Fat, Fatty Acid, and Cholesterol Content of Foods, 21 C.F.R. § 101.62 (2009).

⁸⁸ FRONT-OF-PACK TRAFFIC LIGHT SIGNPOST LABELING, *supra* note 76, at 6.

⁸⁹ See, e.g., 21 U.S.C. § 343(r)(3)(C) (allowing manufacturers to petition to

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While the FSA program does not “determine the design of individual approaches,” it does provide stop light design advice based on the consumer research used to develop the program.⁹⁰ The overarching message of the design guidance is that consumers should be able to read the symbols easily and quickly. The information advises consumers to eat mainly green and amber foods, with red foods “fine to eat . . . occasionally or as a treat, but think about how often you choose it and how much of it you eat.”⁹¹ The general government message to consumers about the program is that “[h]ealthy eating is all about getting the right overall balance.”⁹²

While the European Commission rejected adopting the FSA’s approach for all of Europe, there has been a proposal to require at least prominent, front-of-package labels for six key pieces of nutritional information.⁹³ The measures are energy (calories), total fat, saturated fat, carbohydrates, sugars and salts.⁹⁴ The proposed regulation’s major purpose is making

nutrition labeling mandatory in the principal field of vision of a food label. It allows for the development of best practice in the presentation of nutrition information, including alternative forms of expression of the nutrition information in relation to overall daily nutrient

make positive health claims based on scientific evidence, but remaining silent on labeling the negative attributes of foods).

⁹⁰ FRONT-OF-PACK TRAFFIC LIGHT SIGNPOST LABELING, *supra* note 76, at 9.

⁹¹ USING TRAFFIC LIGHTS TO MAKE HEALTHIER CHOICES, *supra* note 79, at 3; *see also* Food Standards Agency, Using Traffic Lights to Make Healthier Choices, <http://www.eatwell.gov.uk/foodlabels/trafficlights/?lang=en> (last visited Jan. 31, 2009).

⁹² USING TRAFFIC LIGHTS TO MAKE HEALTHIER CHOICES, *supra* note 79, at 2.

⁹³ Stephen Castle and Elisabeth Rosenthal, *EU Plans Food Labels to Cut Rates of Obesity*, INT’L HERALD TRIB., Jan. 30, 2008, available at <http://www.iht.com/articles/2008/01/30/europe/fat.php>.

⁹⁴ *Commission Proposal for a Regulation of the European Parliament and of the Council on the Provision of Food Information to Consumers*, COM (2008) 40 final (Jan. 30, 2008).

requirements or graphical forms of presentation.⁹⁵

Even though some were disappointed that the EU declined the traffic light system, the fact that the UK has successfully launched the system and that the EU is contemplating label redesign should alert American regulators and manufacturers that change is afoot.

One American supermarket chain has already launched a program providing consumers with more information with the intent to help them make healthier food choices. Hannaford Company's "Guiding Stars" is a program for "nutritious shopping made simple."⁹⁶ An "expert panel of scientists"⁹⁷ who evaluate foods based on the most current scientific information, including the 2005 Federal Dietary Guidelines for Americans, advises the company's program. The panel then assigns one (good), two (better), or three (best) stars to products. A product can also earn no stars, indicating it is not a good dietary choice.⁹⁸ These stars allow consumers to pick foods with more vitamins, minerals, fiber, and whole grains and less saturated fat, trans fat, cholesterol, added sugars, and added salts.⁹⁹

Hannaford stores display the star system on the shelf for consumers to easily view while shopping. The program's web guide also details how products are evaluated, who evaluates them, and how consumers benefit from the program. The program is marketed as having six core attributes: it's easy, it's fun, it's fast, it's good for you, it's grounded in science, and it's fair.¹⁰⁰ This program is one that other food retailers will likely adopt and is a powerful example of the private market providing additional

⁹⁵ *Id.*

⁹⁶ *What is Guiding Stars?*, *supra* note 30.

⁹⁷ Hannaford, *Scientific Advisory Panel*, http://www.hannaford.com/Contents/Healthy_Living/Guiding_Stars/scientific_advisory.shtml (last visited Jan. 31, 2009).

⁹⁸ Hannaford, *How Guiding Stars Works*, http://www.hannaford.com/Contents/Healthy_Living/Guiding_Stars/how_guiding_stars_work.shtml (last visited Feb. 4, 2009).

⁹⁹ *What is Guiding Stars?*, *supra* note 30.

¹⁰⁰ Hannaford, *Benefits of Guiding Stars*, http://www.hannaford.com/Contents/Healthy_Living/Guiding_Stars/benefits.shtml (last visited Feb. 4, 2009).

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information to the consumer.

However, the program also raises excellent questions about the future of information in the food economy. Had the federal government been more responsive to issues such as those involving salt well before national organizations began to call for rescinding GRAS, perhaps Guiding Stars would not be necessary. Alternatively, perhaps a private labeling system will be more trusted by consumers than politicized federal regulations. In any event, the federal government should take note of the Guiding Stars program and encourage more innovation in information exchange between manufacturers and consumers. It already has a starting point: The National Organic Program.

II. MORE FROM MARKETING PROGRAMS? THE NATIONAL ORGANIC PROGRAM

The primary reason that I paid more than Mr. Conventional at the grocery store was that I bought organic products.¹⁰¹ Should I have? The National Organic Program (NOP) is simply a marketing tool.¹⁰² As the program ages, it faces increasing criticism that it misleads consumers who purchase organics for health or social concerns.¹⁰³ However, the USDA Organic symbol is not an icon of health and purity, or even safety.

The NOP represents a positive innovation in promoting consumer education. It marks a substantial step towards informing consumers about the process by which their foods are made.¹⁰⁴ The

¹⁰¹ See National Organic Food Production Act, 7 U.S.C. §§ 6501–6523 (2006); 7 C.F.R. Part 205 (2008).

¹⁰² USDA, NATIONAL ORGANIC PROGRAM BACKGROUND INFORMATION (Oct. 2002, updated Apr. 2008), available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004443 (“The NOP is a marketing program housed within the USDA Agricultural Marketing Service. Neither the OFPA nor the NOP regulations address food safety or nutrition.”).

¹⁰³ See generally A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organic and Other Legal Challenges for the Industry’s Next Ten Years*, 12 *DRAKE J. AGRIC. L.*, 17, 59 (2007); Michelle T. Friedland, *You Call that Organic? The USDA’s Misleading Food Regulations*, 13 *N.Y.U. ENVTL. L.J.* 379 (2005).

¹⁰⁴ Hornstein, *supra* note 24, at 1551; see also M.L. Louriero et al.,

objective standards, while not perfect as discussed below, at least give consumers information that they can use not only to make purchasing decisions, but to hold manufacturers accountable for failing to meet certain standards.¹⁰⁵ This feature of NOP is extremely important to consumers, especially given the FDA's position that genetically engineered foods are presumed safe under the FDCA.¹⁰⁶ It also promotes economic efficiency because consumers can find the products they want. In turn, their purchases signal manufacturers that there is demand for organic products.

A. Marketing Logo Helps Consumers Avoid Genetically Engineered Foods

The FDA's Notice in 1992 presuming that genetically engineered foods were "generally regarded as safe" was controversial because many consumers believed then, and still do today, that such foods are in fact unsafe.¹⁰⁷ The petitioners in *Alliance for Bio-Integrity v. Shalala* challenged FDA's issuance of the Notice, claiming that the Agency's position on genetically engineered foods required rulemaking in accordance with the provisions of the Administrative Procedure Act.¹⁰⁸ The court

Assessing Consumer Preferences for Organic, Ecolabeled, and Regular Apples, 26 J. OF AGRIC. & RESOURCE ECON. 404, 413–14 (2002) (analyzing niche market for eco-labeled apples when compared to organic or conventional apples and concluding that the organic label may be preferable to an eco-label if production costs are the same).

¹⁰⁵ See *infra* notes 128–56 and accompanying text.

¹⁰⁶ Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 22,991 (Dep't of Health & Human Servs. May 29, 1992) (notice) ("[C]onsumers must be informed, by appropriate labeling, if a food derived from a new plant variety differs from its traditional counterpart such that the common or usual name no longer applies to the new food, or if a safety or usage issue exists to which consumers must be alerted."); see also 21 U.S.C. § 321(s) (providing that any substance that becomes a compound of food is a food additive).

¹⁰⁷ *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000) (granting defendant-FDA's motion for summary judgment on issues of genetically engineered food's notice requiring rulemaking).

¹⁰⁸ *Id.* at 172.

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rejected this argument, specifically finding that the FDA properly classified the Notice as a “policy statement” rather than a substantive rule.¹⁰⁹ This was the proper outcome because the FDA’s Notice created no new binding rules for genetically engineered foods and only served to clarify that the FDCA’s standard requirements for food additives apply equally to such foods.¹¹⁰

The FDA’s presumption that genetically engineered foods are GRAS rested on its determination that “the only substances added to rDNA engineered foods are nucleic acid proteins, generally recognized as not only safe but also necessary for survival.”¹¹¹ While the petitioners claimed that this position was contrary to statute and that the FDA’s Notice was “arbitrary and capricious,” the court disagreed, reasoning that the petitioners failed to dispute the FSA’s position that nucleic acid proteins are GRAS.¹¹² Rather, the petitioners argued that the safety of such proteins in genetically engineered foods was unknown.¹¹³ Reviewing the GRAS standard, the court ultimately concluded that there was no scientific evidence that the presumption of safety was unwarranted.¹¹⁴ However, in

¹⁰⁹ *Id.* (“A substantive rule, which must undergo a formal notice-and-comment process is a rule that ‘implement[s]’ a statute and has ‘the force and effect of law . . . [p]olicy statements, on the other hand, are statements issued by an agency to advise the public prospectively of the manner in which the agency proposed to exercise a discretionary power.’” (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.29 (1979)).

¹¹⁰ *See id.* (“[T]he statement does not declare that transferred genetic material will be considered GRAS; rather, it announces that such material is *presumed* to be GRAS. This presumption of safety is rebuttable because the FDA will require food additive petitions in cases where safety questions exist sufficient to warrant formal pre-market review by FDA to ensure public health protection.”) (emphasis in original, internal citations and quotations omitted).

¹¹¹ *Id.* at 176 (citing Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,990).

¹¹² *Id.* at 177. The petitioner did not challenge the safety of nucleic acid proteins, but rather attempted to argue that nucleic acid proteins *may* not be GRAS when in genetically engineered foods. *Id.*

¹¹³ *Id.*

¹¹⁴ *Alliance for Bio-Integrity*, 116 F. Supp. 2d at 178–79 (“To be generally recognized as safe, a substance must meet two criteria: 1) it must have technical evidence of safety, usually in published scientific studies, and 2) this technical

2001, the FDA did replace the GRAS presumption with a rigorous pre-market notice procedure.¹¹⁵ While that process is probably somewhat reassuring to consumers who are aware of it, the fact that manufacturers do not have to label genetically engineered foods is not.¹¹⁶

Understanding that the FDA views genetically engineered foods as materially the same as their conventional counterparts is key to understanding how, as a consequence, consumers have no leverage to demand labels disclosing the presence of genetically engineered foods or ingredients.¹¹⁷ The determination of materiality “is a factual predicate to the requirement of labeling.”¹¹⁸ Unless the FDA classifies genetically engineered foods as “materially” different from their conventional counterparts, the agency lacks the legal authority to require labeling.¹¹⁹ Accordingly, it allows genetically engineered foods to be marketed for human consumption without labels disclosing the presence of genetically engineered ingredients. This is so as long as the genetically engineered ingredient passes the pre-market procedure.¹²⁰ Thus, when a genetically engineered food complies with the pre-market procedure and the FDA approves it, consumers have no legal argument that genetically engineered foods are

evidence must be generally known and accepted in the scientific community. See 21 C.F.R. 170.30 (a-b) . . .”).

¹¹⁵ Pre-market Notice Concerning Bioengineered Foods, 66 Fed. Reg. 4706 (proposed Jan. 18, 2001) (to be codified at 21 C.F.R. pts. 192 and 592).

¹¹⁶ Einsiedel, *supra* note 3, at 232.

¹¹⁷ *Alliance for Bio-Integrity*, 116 F. Supp. 2d. at 179 (“Plaintiffs fail to understand the limitation on the FDA’s power to consider consumer demand when making labeling decisions because they fail to recognize that the determination that a product differs materially from the type of product it purports to be is a factual predicate to the requirement of labeling.”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (“Only once materiality has been established may the FDA consider consumer opinion to determine whether a label is required to disclose a material fact.” Thus, “if there is a [material] difference, and consumers would likely want to know about the difference, then labeling is appropriate. If, however, the product does not differ in any significant way from what it purports to be, then it would be misbranding to label the product as different, even if consumers misperceived the product as different.”) (citation omitted).

¹²⁰ *Id.*

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materially different from their conventional counterparts.¹²¹ There is no indication that the FDA will change its approach to genetically engineered foods because there is little scientific reason to do so.¹²² Therefore, consumers must rely on voluntary labeling of “no genetically engineered ingredients” on foods or purchase 100% USDA Organic foods. This information is provided, though not perfectly, by NOP labeling and standards.

Consumers can rely on the USDA Organic icon to indicate a food producer has followed the NOP regulations that exclude use of genetically engineered ingredients during production.¹²³ However, consumers cannot rely on the icon to indicate that food is actually free of genetically engineered ingredients.¹²⁴ The NOP regulations do not set a zero tolerance level for genetically engineered substances or pesticides and tolerate unintentional

¹²¹ “Materially different” is a reference to 21 U.S.C. § 321(n). *See Alliance for Bio-Integrity*, 116 F. Supp. at 178 (“21 U.S.C. § 321(n), grants the FDA limited authority to require labeling. In general, foods shall be deemed misbranded if their labeling ‘fails to reveal facts . . . material with respect to consequences which may result from the use of the article to which the labeling . . . relates under the conditions of use prescribed in the labeling . . . or under such conditions of use as are customary or usual.’ 21 U.S.C. § 321(n).”).

¹²² There is no scientific evidence that genetically engineered foods that have gone through the pre-market clearance process pose a safety risk to humans. Genetically engineered foods are considered safe once they have FDA approval for human consumption (or animal consumption if used in animal feed for stock intended for human consumption). *See* Linda Bren, *Genetic Engineering: the Future of Foods?*, FDA CONSUMER MAG. (2003), available at http://www.fda.gov/fdac/features/2003/603_food.html (“If a food does not meet the safety standards, the FDA has the authority to take it off the market.”); *see, e.g.*, FDA, List of Completed Consultations on Bioengineered Foods (Feb. 2009), available at <http://www.cfsan.fda.gov/~lrd/biocon.html>.

¹²³ 7 C.F.R. §§ 205.2, 205.105(e) (2009) (restricting the use of the “100% organic” label to foods produced without “Excluded methods,” which are defined as “a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions . . . including . . . recombinant DNA technology.”).

¹²⁴ Friedland, *supra* note 103, at 397 (indicating that the standards only govern the producer’s intentional actions, and accordingly, a violation may not occur even if an excluded substance is detected).

exposure to excluded methods of production.¹²⁵ Additionally, if certified products do not meet the NOP standards, then there is a process to decertify the producer.¹²⁶ However, there is no affirmative requirement that foods labeled organic be tested for compliance with the regulations.¹²⁷

B. The USDA Organic Model Allows Consumers to Demand Compliance

Given the criticism of NOP and consumer concerns over genetically engineered foods and pesticide residue, it is somewhat surprising that the first widely reported decertification process involves milk production, rather than produce.¹²⁸ Even more interesting is that core issues of the case—non-compliant dairies profiting from high organic milk prices but providing non-compliant organic milk to consumers—are primarily economic rather than public health complaints.¹²⁹ For several years, the Cornucopia Institute,¹³⁰ a grassroots organization whose motto is “Promoting Economic Justice for Family-Scale Farming,” has been monitoring the organic dairy industry.¹³¹ The organization’s mission is to protect smaller farms, so it was particularly interested in whether larger scale organic dairies were indeed following NOP regulations. Its research suggested that some large-scale operators

¹²⁵ *Id.* However, courts have held producers liable for failure to prevent commingling of foods that contaminated organic food supplies. *See In re Starlink Corn Prod. Liab. Lit.*, 212 F. Supp. 2d 828, 841–43 (N.D. Ill. 2002) (examining liability where genetically engineered corn not approved for human consumption contaminated consumer food products).

¹²⁶ *See* 7 C.F.R. § 205.405 (outlining the decertification process).

¹²⁷ Friedland, *supra* note 103, at 391–97.

¹²⁸ *See infra* notes 131–50 and accompanying text.

¹²⁹ Since many consumers claim to buy organic for health reasons, it would seem that “purity” of organic products might have been the first well-known case of non-compliance. Instead, Cornucopia’s work focuses on the economic impact that large-scale farming has on small, family operations. *See* Cornucopia Institute, <http://www.cornucopia.org> (last visited Jan. 30, 2009).

¹³⁰ *Id.*

¹³¹ *Id.*

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were not.¹³²

As a result, in November 2005 the Cornucopia Institute complained to the USDA that Aurora Organic Dairy did not have sufficient pasture to meet the NOP standards.¹³³ A subsequent investigation by the USDA Agricultural Marketing Service's NOP confirmed that Aurora was not in compliance with the NOP regulations.¹³⁴ In April 2007, the USDA notified Aurora that it would revoke its organic standard for its Platteville, Colorado facility.¹³⁵ By August of that year, the USDA and Aurora entered into a consent agreement requiring the facility to satisfy various conditions and requiring Aurora to submit new organic systems plans, as well as imposing a one-year probationary review period.¹³⁶

The agreement sets eight specific requirements.¹³⁷ Aurora must allow lactating and dry (non-lactating) cows on pasture daily during the growing season,¹³⁸ clarifying that lactation is not a stage of production that would exempt cows from accessing pasturage.¹³⁹ Aurora must also reduce its herd size in relation to the pasture size; the herd must be sized for four lactating cows per acre

¹³² ALAN KASTEL, CORNUCOPIA INSTITUTE, MAINTAINING THE INTEGRITY OF ORGANIC MILK 16–17 (2006), http://cornucopia.org/dairysurvey/OrganicDairyReport/cornucopia_milkintegrity.pdf.

¹³³ USDA, Q&AS ON THE AURORA CONSENT AGREEMENT, <http://www.ams.usda.gov/> (search “aurora consent agreement q&a,” click on first entry) [hereinafter Q&AS ON THE AURORA CONSENT AGREEMENT]; see also Press Release, USDA, Aurora Organic Dairy Signs Consent Agreement with USDA's Agricultural Marketing Service (Aug. 29, 2007), <http://www.usda.gov/> (click “Newsroom,” click “Latest Releases,” Choose “August” and “2007” from dropdown options, click on “Aug 29, 2007 Aurora Organic Dairy Signs Consent Agreement with USDA's Agricultural Marketing Service”).

¹³⁴ Q&AS ON THE AURORA CONSENT AGREEMENT, *supra* note 133.

¹³⁵ *Consent Agreement M-005-06*, ¶ 2 (Aug. 23, 2007), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5063456&acct=nopgeninfo> [hereinafter *Consent Agreement*].

¹³⁶ *Id.* ¶ 11–14.

¹³⁷ Q & A'S ON THE AURORA CONSENT AGREEMENT, *supra* note 133.

¹³⁸ The growing season is generally considered to be May 1 through September 30 in Platteville, Colorado. See *Consent Agreement*, *supra* note 135, ¶ 7(c); Q&AS ON THE AURORA CONSENT AGREEMENT, *supra* note 133.

¹³⁹ Q & A'S ON THE AURORA CONSENT AGREEMENT, *supra* note 133.

and five dry cows per acre.¹⁴⁰ In addition, calves must be allowed to remain at Platteville until they are weaned and ready for pasture, which is usually around four to six months.¹⁴¹ Aurora must also remove certain cows that it improperly transitioned into the organic herd.¹⁴²

Moreover, non-compliance with any of the agreement's terms during the one-year probationary period may trigger resumption of the decertification process.¹⁴³ Additional provisions include that Aurora shall bear the costs both of inspection at its Platteville facility, should the USDA choose to conduct one, and certification resulting from full compliance with its obligations by October 15, 2008.¹⁴⁴ However, these administrative requirements are not the only challenge that Aurora must face.

In December 2007, Aurora became the defendant in a class action suit for allegedly selling "milk and milk products which it purports to be organic—and for which it charges the higher organic price—but which it produces without adherence to federal law."¹⁴⁵ The multidistrict litigation has since been centralized in the Eastern District of Missouri,¹⁴⁶ and now names Wal-Mart, Safeway, Wild Oats, Target, and Costco as co-defendants.¹⁴⁷ The basic complaint is that non-compliance with NOP while using the USDA Organic label deceived consumers who paid the premium price.¹⁴⁸

The Aurora complaints illustrate how the improved exchange of information empowers the consumer. The NOP standards are

¹⁴⁰ *Consent Agreement*, *supra* note 135, ¶ 7(d), (e).

¹⁴¹ *Id.* ¶ 7(d).

¹⁴² *Id.* ¶ 7(a), (b).

¹⁴³ *Id.* ¶ 13.

¹⁴⁴ *Id.* ¶¶ 13(c), 14.

¹⁴⁵ Complaint ¶ 2, *West v. Aurora Dairy Corp.*, No. 07-02625 (D.C. Colo. Dec. 18, 2007) [hereinafter *Aurora Dairy Complaint*].

¹⁴⁶ Transfer Order, *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 536 F. Supp. 2d 1369 (J.P.M.L. Feb. 20, 2008) (MDL No. 1907)).

¹⁴⁷ Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407(a) ¶ 1, *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 4:08MD01907 ERW (Mar. 14, 2008) (MDL No. 1907); Schedule CTO-1, Tag-Along Actions.

¹⁴⁸ *Aurora Dairy Complaint*, *supra* note 145, ¶¶ 27–33.

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quite clear about pasturage and compliance timeframes for organic dairies.¹⁴⁹ Cornucopia Institute did not need to engage in complex testing or scientific analysis of Aurora's milk, as it could simply rely on eyewitness reports of herd size and photographs to find NOP violations.¹⁵⁰

With the successful action against Aurora initiated, Cornucopia has since filed additional NOP non-compliance complaints with USDA. On February 16, 2005, it wrote to the NOP compliance office that a certified organic dairy in California denied pasture access for its 3000 head herd.¹⁵¹ Again, Cornucopia relied on information from workers, but also from having other dairy professionals simply drive by the facility on clear days and observing no cows in the pasture.¹⁵² Whether this will result in action against the farm remains to be seen, but the impact of "watchdog" organizations will play an important role in the future of NOP.

Cornucopia Institute has not limited its complaints to specific farming operations. On May 10, 2008, it made a broader complaint against Dean Foods and the influence of large corporations on NOP.¹⁵³ The phenomenon of large corporate players in the organic market is a hot button issue for many, including consumers.¹⁵⁴

¹⁴⁹ NOP's dairy provisions have been controversial from their inception. Due to the high costs of converting conventional to organic dairies, the regulations have certain provisions that attempt to cushion the financial impacts of organic milk production at the cost, some believe, of the "organic ideal." See *Harvey v. Johanns*, 494 F.3d 237 (1st Cir. 2007); *Harvey v. Veneman*, 396 F.3d 28, 33 (1st Cir. 2005).

¹⁵⁰ See Cornucopia Institute, Aurora Factory Farm Photos, <http://www.cornucopia.org/index.php/horizon-factory-farm-photo-gallery/aurora-factory-farm-photo-gallery/> (last visited Jan. 31, 2009); Letter from Will Fantle, Codirector, The Cornucopia Institute to Phyllis Fong, USDA – Office of Inspector General (Feb. 16, 2005), www.organicconsumers.org/artman2/uploads/1/OIG_Letter.pdf.

¹⁵¹ Letter from Will Fantle, Codirector, The Cornucopia Institute to Eileen Broomell, NOP Compliance, USDA (Feb. 16, 2005), <http://www.cornucopia.org/case-vander-eyk-jr-dairy-farm>.

¹⁵² See *id.*

¹⁵³ Letter from Will Fantle to Phyllis Fong, *supra* note 150.

¹⁵⁴ Dr. Phillip Howard, Organic Industry Structure, <https://www.msu.edu/~>

However, Cornucopia's complaint goes beyond the standard philosophical ideal that organics are off-limits to large corporations. The complaint demands an investigation into why, unlike the investigation of Aurora and other organic dairies with compliance problems, complaints against Dean's Horizon facility in Idaho were ignored. The Cornucopia Institute called upon the Inspector General "to review this matter and determine why an investigation never took place at Dean/Horizon's Idaho factory farm [and] . . . to determine why the apparent double standard, in terms of enforcement exists."¹⁵⁵ It further cautioned that "[t]he integrity of the organic label and the integrity and reputation of the USDA are at stake."¹⁵⁶

Lawmakers should take note of Cornucopia's complaints, as well as the class action related to the information revealed in those complaints. These activities demonstrate that consumers, when provided with enough information, can and will proactively demand that food meets its labeled standard.

IV. CONCLUSION

NOP serves as an excellent illustration of how transparent information influences the marketplace. While NOP still has a long way to go to educate consumers about what "USDA Organic" means, it is on the right path. The FDA should take notice of how a marketing program can provide information consumers want, while also balancing the needs of producers. If the FDA did take notice, it might be inclined to follow the UK's traffic light label examples noted above.¹⁵⁷

Optimizing information in the food economy is no simple task. As labeling analysts have noted, "as with any policy, the costs and benefits of government intervention in labeling must be weighed, and the sometimes conflicting demands of economic efficiency, consumer and producer concerns, public opinion, political

howardp/organicindustry.html (presenting various charts showing ownership of organic food companies) (last visited Feb. 5, 2008).

¹⁵⁵ Letter from Will Fantle to Phyllis Fong, *supra* note 150, at 2–3.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ See *supra* notes 76–82 and accompanying text.

expediency, and current events must be sorted and evaluated.”¹⁵⁸ The circumstances surrounding the UK, Hannaford, and the NOP all illustrate how information exchange can change consumers’ view and power in the marketplace. Conversely, the American milk controversy illustrates how limiting information leads to misinformed consumers and market inefficiencies.

Better information exchange in the food economy also leads to better data for manufacturers and policy makers. The traffic light label system, for example, links scientific evidence of healthy eating habits with a simple way to signal consumers how to eat healthily. The real test of that system, as well as Hannaford’s Guiding Stars, is whether purchasing patterns will be altered. If consumers purchase and demand more “green light” or “three star” options, manufacturers can produce more products to meet that demand. Should consumer patterns not be altered or should they prove that “red light” or no star options remain popular, there is then a signal to government that its health message is not clear, or that people do not care to manage their health. If it is the former, then government has information that can help it better allocate its educational resources. If it is the latter, then lawmakers and policy analysts must grapple with how to allocate the costs of irresponsible citizens.

The food economy is a complex mix of law and economics, among other things. In the current food economy, law trumps economics in the sense that the constraints of the FDCA, FTC, USDA, and even commercial speech govern what information most consumers receive. Given the decline of public health as a result of obesity and environmental troubles related to agriculture, one can only imagine that the information exchange between food manufacturers and consumers is accelerating the “race to the bottom” that Akerlof predicts whenever there is asymmetric information.¹⁵⁹ While economic modeling is valuable to proving the phenomenon, rebalancing the flow of information in the food economy will require lawmakers to revisit our currently regulatory scheme. The sooner, the better.

¹⁵⁸ Golan, *supra* note 3, at 1.

¹⁵⁹ See discussion *supra* note 8.

*Appendix A: The Shopping List*¹⁶⁰

My Purchases/Per Serving Nutritional Information	Total Cost/Package Size/Serving	Front Pack Label Information/Claims
Kashi Pesto Pasta Calories 290 Sodium 750 mg Fat 11 grams Sugars 4 grams	\$3.99/10 ounces /One Serving	All Natural
Olivia's Organic Salad Calories 15 Sodium 60 g Fat 0 g Sugars 0g	\$3.99/ 5 ounces/ 2 cups (85 grams)	USDA Organic
Zinfandel Low Fat Vinaigrette Calories 60 Sodium 480 mg Fat 2.5 g Sugars 7 g	\$3.99/8 ounces/2 tablespoons (29 grams)	Low Fat
Store Brand Organic Milk Calories 90 Sodium 130 mg Fat 0 g Sugars 12 g	\$3.99/ half gallon/8 ounce glass	USDA Organic
Late July Dark Chocolate Sandwich Cookies Calories 150 Sodium 125 mg Fat 6 g Sugars 9 g	\$3.99/ 8.2 ounces/ 3 cookies (33 grams)	USDA Organic

¹⁶⁰ All prices surveyed on July 10, 2008 at Shaw's Supermarket and Concord Co-op Market in Concord, New Hampshire, USA.

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TOTALS Calories 605 Sodium 1545 mg Fat 19.5 g Sugars 32 g	Total Cost \$19.95	
Mr. Conventional's Purchases/Nutritional Information	Total Cost/Package Size/Serving	Front Pack Label Information/Claims
Progresso Soup Rich n' Hearty Steak and Russett Potato Calories 140 (280) (whole can) Sodium 990 (1980) mg Fat 1.5 (3.0) g Sugars 3 (6) g	\$1.89/ 18.5 ounces/ ½ Can (246 grams)	None
Iceberg Salad Mix Calories 15 Sodium 0 g Fat 0 g Sugars 2 g	\$2.29/ 16 ounces/ 1.5 cups (85 grams)	None
Creamy Greek Dressing Calories 160 Sodium 160 mg Fat 16 g Sugars 3 g	\$3.99/8 ounces/2 tablespoons (29 grams)	None
Store Brand Whole Milk Calories 150 Sodium 125 mg Fat 8 g Sugars 12 g	\$2.50/ half gallon/ 1 cup	None
Oreos Calories 160 Sodium 190 mg Fat 7g Sugars 14g	\$2.50/18 ounces/ 34 grams – no cookie number listed	None
TOTALS	Total Cost	

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Calories 625 Sodium 1465 mg Fat 32.5 g Sugars 34 g	\$13.17	
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